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COUNTRY HEIGHTS HOLDINGS BHD v. KETUA PENGARAH HASIL DALAM NEGERI & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[CIVIL APPEAL NO: R2-14-15-11-2014]
B 10 AUGUST 2017

REVENUE LAW: *Real property gains tax – Assessment – Notices of assessment and notices of additional assessment – Notices of assessment and notices of additional assessment – Whether time-barred – Whether Special Commissioner of Income Tax*
C *erred in interpretation of s. 15(2) of Real Property Gains Tax Act 1976 – Whether s. 16(1) applicable to appellant who is neither disposer or acquirer of property – Whether acquirer and disposers filed returns in prescribed forms prior to assessments – Whether wilful default established – Whether appellant ought to be discharged from notice of assessment and penalty*

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REVENUE LAW*: Real property gains tax – Assessment – Notices of assessment and notices of additional assessment – Whether time-barred – Whether DGIR could rely on s. 15(2) of Real Property Gains Tax Act 1976 to extend time bar – Whether s. 15(2) only applicable to 'disposer' of property – Whether appellant issued notices of assessment in capacity as acquirer – Whether DGIR could enlarge time for*
E *assessment to make good the loss of tax purportedly due to fraud or wilful default*

This was an appeal by the appellant by way of a case stated pursuant to para. 34 of Schedule 5 of the Income Tax Act 1967 against part of the deciding order made by the Special Commissioner of Income Tax ('the SCIT'). All the six vendors which disposed of the properties were
F companies fully-owned by Tan Sri Lee Kim Tiong ('Tan Sri Lee'). Tan Sri Lee was also the director, managing director and major shareholder of the appellant. Based on the audit conducted by the Investigation Department of the Inland Revenue Board, it was disclosed that the companies did not lodge their statement of disposal *vide* Form CKHT-1 to the respondent as provided
G under s. 13(1)(a) of the Real Property Gains Tax Act 1976 ('the RPGTA') prior to the audit *ie*, on 8 July 2004. The appellant too did not lodge its statements of acquisition *vide* Form CKHT-2 to the respondent before 8 July 2004. Subsequently, both the appellant, as the acquirers of the properties, and the six companies, as the disposers of the properties, sent the respective
H Forms to the respondent. Negotiations were made on behalf of all the disposers for the real property gains tax to be paid to the respondent and a letter to that effect was forwarded to the respondent together with post-dated cheques. The disposers had admitted liability for the real property gains tax with respect to the disposal of the properties including 10% penalties
I imposed by the respondent. A proposal for payment *vide* instalment was also made by the disposers which was approved by the respondent. The

respondent did not issue 13 notices of assessment and the notices of additional assessment for YAs 1993, 1998 and 1999 respectively to the disposers of the properties but had instead sent all the notices to the appellant as the acquirer of the property. Aggrieved, the appellant lodged an appeal to the SCIT. The SCIT ruled against the appellant. Hence, the appeal on the issues of (i) time bar provision under s. 15(1) of the RPGTA; (ii) the exception to the time bar provision under s. 15(2) of the RPGTA; (iii) the applicability of ss. 15(2) and 16(1)(b) of the RPGTA on the appellant, the acquirer of the chargeable asset; (iv) whether the respondent could validly issue notices of assessment and notices of additional assessment for YAs 1993, 1998 and 1999 on the appellant when compliance with the same would give rise to the commission of offences under the Securities Industry Act 1983 ('SIA'), the Capital Markets and Services Act 2007 ('CMSA') and the Companies Act 1965 ('CA'); (v) date to be considered for purposes of issuance of the notice of assessment and notices of additional assessment for the purpose of real property gains tax; and (iv) whether the respondent had properly exercised his discretion in imposing 10% penalty on the appellant.

Held (allowing appellant's appeal with costs; dismissing respondent's cross-appeal with costs):

(1) All the notices of assessments and the notices of additional assessments for YAs 1993, 1998 and 1999 raised in 2006 were time-barred under s. 15(1) of the RPGTA as the notices were issued beyond the six years from the end of YAs 1993 and 1998. The respondent could only rely on s. 15(2) of the RPGTA which extends the time bar in cases involving fraud and wilful default committed by the person chargeable with the tax. The plain reading of s. 15(2) of the RPGTA showed that the person responsible to make good loss of tax attributable to the fraud or wilful default by that person, could only mean the 'disposer' of the property. The notices of assessment (Forms K) and notices of additional assessment (Forms KA), including the penalty for YAs 1993 were not raised on the appellant to make good loss of tax arising from purportedly the wilful default of the appellant as the disposer. Instead, the appellant had been issued with notices of assessment and notices of additional assessment in its capacity as the acquirer of the chargeable assets. (paras 19, 20, 30 & 31)

(2) Section 16(1) of the RPGTA provides a departure from the general rule wherein it allows the Director General ('the DG') to make an assessment on the acquirer of an amount equal to the amount of tax payable by the disposer when 'there is failure by both the disposer and the acquirer to submit a return to the DG in the prescribed form as required under s. 13'. However, without any express provision in s. 15(2) to connect the acquirer to the particular section, the respondent could not rely on s. 15(2) to open up the time bar provision for him to

make an assessment on the acquirer to make good the loss of tax purportedly attributable to fraud or wilful default. There was nothing to suggest that the respondent could rely on s. 5(2) of the RPGTA for the purpose of s. 16(1)(b) of the RPGTA. (paras 35 & 36)

(3) Based on its ordinary, plain and natural meaning, the words in s. 15(2) must only mean and/or interpreted to mean, in cases where the assessment is made beyond the six-year period, the person chargeable with tax who is responsible for making good any loss of tax attributable to fraud or wilful default, is the disposer of the chargeable asset. Hence, the exception to the six-year time bar specified in s. 15(2) of the RPGTA could not apply to the appellant as the acquirer of the chargeable asset in respect to the notices of assessment and notices of additional assessment for YAs 1993. The SCIT had erred in law in its interpretation of the specific provisions of the RPGTA by making the appellant who was not a 'disposer' to make good the loss of tax, purportedly due to the acquirer's fraud or wilful default. (paras 38-39)

(4) With respect to the YAs 1998, the SCIT clearly erred because, after finding that the acquirers of the real properties were the subsidiaries of the appellant, it again made a finding that the transfer of the real properties occurred between Tan Sri Lee's private companies to the appellant. Hence, the SCIT had erred when it reached a conclusion that contravened the finding of facts and the deciding order. Hence, s. 16(1) of the RPGTA would not be applicable to the appellant as the appellant was neither the disposers of the asset nor the acquirers of the real properties with respect to the YA 1998. (paras 40, 41 & 43)

(5) Further, the respondent could not invoke s. 16(1)(b) of the RPGTA as the appellant was neither the disposer nor the acquirer of the real properties. The section could not be applied to assess the appellant once both the appellant and the disposers had filed their returns in the prescribed form as was proven before the SCIT. As the appellant was not the disposer, the respondent could not rely on s. 15(2) for the appellant to make good the loss suffered by the respondent, purportedly due to the fraud or wilful default of the appellant. Therefore, the notices of assessment and notices of additional assessment issued to the appellant with respect to YA 1998 were illegally and unlawfully issued. In the circumstances, for the purpose of YAs 1993, 1998 and 1999, the respondent could not invoke s. 15(2) to enlarge the time for assessment to make good the loss of tax purportedly due to fraud or wilful default. (paras 44, 46 & 47)

(6) Section 16(1)(b) of the RPGTA could only be invoked if both the acquirer and the disposers do not file the returns in the prescribed form. There was no finding of fact on the refusal or failure of the disposers to

pay. In fact, for YAs 1993, both the acquirer and the disposer had filed the returns in the prescribed forms before the date of assessments. With the filing of the relevant forms by the disposers and the acquirers pursuant to the directions of the respondent, the admission of liability by the disposer, the execution of letters of agreement and the issuance of post-dated cheques according to the approved instalment scheme, the SCIT had made a blatant error in law in concluding that the appellant was guilty of wilful default in connection with the real property gains tax. The finding of facts by the SCIT was not supported by the evidence. (paras 55, 75, 76, 81 & 82)

(7) Section 6 of the RPGTA provided for real property gains tax to be charged in respect of chargeable gain accruing in the year of the disposal of the chargeable asset. Although the respondent's witness admitted that there was error in taking the disposal date of real property as 21 May 1999 instead of 15 September 1998 the date the SPA was executed, no steps were taken by the respondent to correct the error. Further, by the respondent's failure to address the issue before the SCIT, the respondent was deemed to have conceded that the notice of assessment for YA 1999 had been wrongly issued. Therefore, the appellant ought to be discharged from the notice of assessment, including the penalty imposed. (paras 83-85)

(8) The appellant ought not to pay taxes of private entities owned by its directors as it would jeopardise the interest of the minority shareholders. If the appellant was directed to pay the tax due to the disposers, it would in fact pay real property gains tax of the disposers which were owned either directly or indirectly by Tan Sri Lee, a director of the appellant. Such payment could breach financial assistance laws *ie*, s. 133A(1) of the CA, s. 11(1) of the SIA and s. 354(1) of the CMSA. Thus, s. 16(1)(b) must not be construed to allow such absurdity of injustice. (paras 88-92)

(9) The notices of assessment and notices of additional assessment for YA 1993, 1998 and 1999 were raised without due proper care and not for proper purpose. Therefore, the 10% penalty imposed on the appellant ought to be discharged. (para 93)

Case(s) referred to:

Director General of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91 SC ***(refd)***

Edwards v. Bairstow [1955] 3 All ER 48 ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***

Frederick Lack v. Dogget (1967-71) 46 TC 524 ***(refd)***

Government of Malaysia v. Gan Chuan Lian [1992] 1 CLJ 678; [1992] 2 CLJ (Rep) 424 HC ***(refd)***

Government of Malaysia v. Ng Song Choon [1974] 1 LNS 41 HC ***(refd)***

Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135 SC ***(refd)***
Mamor Sdn Bhd v. Director General of Inland Revenue [1979] 1 LNS 145 ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
Palm Oil Research & Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Paramount (M) Sdn Bhd v. Pesuruhjaya Khas Cukai Pendapatan [2002] MSTC 3,908 ***(refd)***
Re City Equitable, Fire Insurance Co Ltd [1925] Ch 407 ***(refd)***
Wellington v. Reynolds [1962] 40 TC 209 ***(refd)***
WT Ramsay v. Inland Revenue Commissioners [1982] AC 300 ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, s. 354(1)
Companies Act 1965, s. 133A(1)
Income Tax Act 1967, s. 91(1), (3), Schedule 5 paras 34, 39, 41, 42
Real Property Gains Tax Act 1976, ss. 6(1), 13(1)(a), 15(1), (2), 16(1)(b), (1A) (3), 21B, 29(3)
Securities Industry Act 1983, s. 11(1)

For the appellant - Vijey M Krishnan; M/s Raja, Darryl & Loh
For the respondent - Seri Hanem Mohd Ayob; FC

Reported by S Barathi

JUDGMENT

Asmabi Mohamad J:

Introduction

[1] This was an appeal by Country Heights Holdings Berhad ("the appellant") by way of a case stated pursuant to para. 34 of Schedule 5 of the Income Tax Act 1967 ("ITA") against part of the deciding order made by the Special Commissioner of Income Tax ("SCIT") on 21 August 2013.

[2] The appellant's appeal relates to six main issues as listed under para. 8 below. The first, second and third issues relate to the time bar provision under s. 15(1) of the Real Property Gains Tax Act 1976 ("RPGTA"), the exception to the time bar provision under s. 15(2) of the RPGTA and the applicability of the provision of s. 15(2) and s. 16(1)(b) of the RPGTA on the appellant, the acquirer of the chargeable asset. The fourth issue touches on the question whether the respondent can validly issue notices of assessment and notices of additional assessment for YAs 1993, 1998 and 1999 on the appellant when compliance with the same would give rise to the commission of offences under the Securities Industry Act 1983

(SIA), the Capital Markets and Services Act 2007 (CMSA) and the Companies Act 1965 (CA). The fifth issue relates to date to be considered for purposes of issuance of the notice of assessment and notices of additional assessment for the purpose of real property gains tax. The last issue relates to whether the respondent has properly exercised his discretion in imposing the 10% penalty on the appellant.

[3] The SCIT dismissed the appellant's appeal with respect to issue 1 to 4 and part of issue 6 and allowed the appellant's appeal with respect to issue 5 and part of issue 6 relating to the imposition of the penalty for YA 1999.

[4] Apart from the above appeal, there is also a cross-appeal filed by the respondent with respect to a small part of the deciding order made by the SCIT against the respondent which relates to assessment in Form K for year of assessment 1999 with respect to assessment of the property disposed of in the year 1998 which the SCIT found in favour of the appellant.

[5] Having perused the documents submitted to this court by way of case stated, read the written submissions and heard the oral submissions by the respective learned counsel for the appellant as well as for the respondent, I found that there were merits in the appellant's appeal and allowed the appeal. With respect to the respondent's cross-appeal, I found that there was no merit in the appeal and dismissed the appeal. After hearing a short submission on the issue of cost I awarded the appellant costs, of RM5,000 for both these appeals.

[6] Aggrieved by the said decision, the respondent appealed to the Court of Appeal against the whole of the said decisions.

[7] For ease of reference, the parties will be referred to as they were before the SCIT, the appellant and respondent respectively.

The Issues For Determination

[8] The issues for the determination of the SCIT were as follows:

(a) Whether the respondent is time-barred under s. 15(1) of the Real Property Gains Tax Act 1976 ("RPGTA") from issuing the notices of assessment (Forms K) and notices of additional assessment (Forms KA) for the years of assessment ("YAs") 1993, 1998 and 1999 under s. 16(1) of the RPGTA - (issue 1);

(b) Whether the respondent has the power to validly issue on the appellant being the acquirer of chargeable assets, the aforesaid notices of assessment (Forms K) and the notices of additional assessment (Forms KA) for YAs 1993, 1998 and 1999 under s. 16(1) of the RPGTA - (issue 2);

(c) If the respondent has the power to validly issue on the appellant, being the acquirer of chargeable assets, the aforesaid notices of assessment (Forms K) and notices of additional assessment (Forms KA) for YAs 1993, 1998 and 1999, whether that power has been validly and properly exercised - (issue 3);

(d) Whether all the aforesaid notices of assessment (Forms K) and notices of additional assessment (Forms KA) for YAs 1993, 1998 and 1999 can be validly issued on the appellant when compliance with and payment of the same (a listed company) would give rise to commission of offences under s. 11(1) of the Securities Industry Act 1983 ("SIA"), s. 354 of the Capital Markets and Services Act 2007 ("CMSA") and/or s. 133A of the Companies Act 1965 ("CA") and whether by reason thereof, the said notices of assessment and additional notices of assessment are null and void - (issue 4);

(e) In issuing a notice of assessment (Form K) for YA 1999 under item 13 of appendix 1 to exh. SA, whether the respondent is correct in taking the disposal date of real property as 21 May 1999, which falls under YA 1999, instead of YA 1998, which is the date under the relevant sale and purchase agreement - (issue 5); and

(f) Whether the respondent is correct in imposing a penalty under s. 29(3) of the RPGTA at the rate of 10% under each of the aforesaid notices of assessment (Forms K) and notices of additional assessment (Forms KA) for YAs 1993, 1998 and 1999 and if not, what penalty, if any, should be imposed - (issue 6).

Salient Facts

[9] The salient facts of the case had been set out at para. 7 of the "case stated" (see paras. (i) to (xxi)). Briefly the facts are as follows:

(a) All the six vendors which disposed of the properties are as listed in appendix 1 under the heading "issues to be determined" (see pp. 5 to 8 of the same document). These companies are Executive Circle Sdn Bhd (previously known as Mines Resort City Sdn Bhd and Green Water Rock Sdn Bhd) (ECSB), Focus Range (M) Sdn Bhd (FRMSB), Heritage Range (M) Sdn Bhd (HRMSB), Natural Circle (M) Sdn Bhd (NCMSB), Executive Review (M) Sdn Bhd (ERMSB) and Amat Matang Sdn Bhd (AMSB) are all companies fully owned by Tan Sri Lee Kim Tiong @ Lee Kim Yew (Tan Sri Lee) (pp. 5, 12, 19, 26, and 33 of exh. D2);

(b) Tan Sri Lee is also the Director, Managing Director and major shareholder of the appellant (pp. 1077, 1100, 1179, 1186, 1201, 1207 and 1208 of exh. C6). Up to 25 June 1999, Tan Sri Lee owned about 40.335% shares in the appellant. Tan Sri Lee also owned 100% shares in Country Heights Ventures Sdn Bhd (CHVSB) (p. 1100 of exh. C6);

(c) Based on the annual report of the appellant for Year 1998/1999, there were five companies which owned shares in the appellant as nominees of Country Heights Ventures Sdn Bhd (CHVSB) namely Arab Malaysian Nominees (Tempatan) Sdn Bhd, Multi Purpose Bank Nominees (Tempatan) Sdn Bhd, Arab Malaysian Nominees (Tempatan) Sdn Bhd and RHB Capital Nominees (Tempatan) Sdn Bhd (see exh. C6 at p. 1101). Nominee Bumiputra (Tempatan) Sdn Bhd held shares in its capacity as nominee for Tan Sri Lee himself (p. 1101 of exh. C6);

(d) On 8 July 2004, the Investigation Department of the Inland Revenue Board, Malaysia did an audit on all the six companies mentioned in para. 9(a) above, all of which were disposers of the properties;

(e) The audit report disclosed that in YA of 1993, ECSB had disposed of its shares to the appellant. Besides the above, the investigation also disclosed that the rest of the companies mentioned in para. 9(a) above had also disposed of their properties to the appellant (see appendix 1 of the "issues to be determined"). All these companies did not lodge their statements of disposal *vide* Form CKHT1 to the respondent as provided under s. 13(1)(a) of the RPGTA prior to the said audit, ie, on 8 July 2004. The appellant as the acquirers of the above-mentioned properties (item 1 to 12 at pp. 5 to 8 of the case stated) too did not lodge its statements of acquisition *vide* form CKHT2 to the respondent prior to 8 July 2004;

(f) Both the appellant as the acquirers of the properties and the six companies as the disposers of the properties, however did send the respective Forms to the respondent on 25 November 2004, 8 September 2004, 27 August 2004 and 25 October 2004 respectively (with respect to the acquirer) and on 25 November 2004, 8 September 2004, 27 August 2004 and 25 October 2004 respectively (with respect to the disposers) (see pp. 86, 96, 103, 110, 118, 129, 134, 139, 144, 149, 154, 159 and 164 of exh. B1 & pp. 333, 335, 338, 341, 344, 347, 350, 353, 356, 359, 362, 365, 368, 371 and 374 of exh. B2);

(g) There were negotiations made on behalf of all the disposers for the real property gains tax to be paid to the respondent. A letter to that effect was forwarded to the respondent together with post-dated cheques (pp. 3-8 of exh. D1). A director's resolution was also passed to give effect to the negotiations as shown in exh. D1 at pp. 1-2);

(h) The disposers had admitted liability for the real property tax gains with respect to the above disposal of the properties including 10% penalties imposed by the respondent. A proposal for payment *vide* instalment payments was also made by the disposers to the respondent (see pp. 228-239 of exh. B2). The scheme of payment was approved by the respondent on 2 June 2005 (pp. 222-227 of exh. B2);

(i) The facts disclosed that all the post-dated cheques were not honoured. In fact, there was a request made by ECSB, as the disposer of the property to differ the instalment payment as it had sought the approval of the Ministry of Finance II for the same to be waived (p. 422 of exh. C3);

(j) The respondent did not issue the 13 notices of assessment and the notices of additional assessment for YAs 1993, 1998 and 1999 respectively to the disposers of the properties but had instead sent all these notices to the appellant as the acquirer of the property; and

(k) Aggrieved by the above action of the respondent, the appellant lodged its appeal to the SCIT for its determination of the issues as set out under the heading "the issues for determination". The SCIT ruled against the appellant with respect to issue 1 to 4 and part of issue 6 and allowed the respondent's appeal with respect to issue 5 and the imposition of the penalty for YA 1999. Issues 1 to 4 relate to the appeal made by the appellant on real property gains tax assessments, including the penalty thereon, issued on the appellant with respect to certain acquisitions made by the appellant in YAs 1993 and 1998.

[10] In a nutshell, this appeal concerns the purported exercise of the respondent's discretion and power to assess the appellant who:

(i) acquired from ECSB, the entire issued and paid-up capital of the real property companies set out in column 7 of items 1 to 8 of appendix 1 to exhibit SA (pp. 5 to 8 of the case stated), for cash consideration (tranche 1 acquisitions); and

(ii) agreed, on behalf of its subsidiaries, to acquire from the companies referred to in column 8 of items 9 to 13 of appendix 1 to exhibit SA (pp. 5 to 8 of the case stated), real properties set out in column 7 of items 9 to 13 of appendix 1 to SA (tranche 2 acquisitions).

[11] In addition to the above, the other salient facts which were disclosed before the SCIT were as summarised by learned counsel for the appellant in learned counsel's written submission. I could not do any better but to adopt the facts as summarised by learned counsel as follows:

(a) The appellant is a public listed company which shares are listed on the Main Market of Bursa Malaysia Securities Berhad ("Bursa Securities"). The appellant was listed on Bursa Securities on 18 February 1994 (p. 1195 of exh. C6). This fact is not disputed by the respondent. As a listed company, the appellant has many shareholders and its shares are publicly traded;

(b) In 1994 and 1999, 47% and 60% of the appellant is held by other shareholders (pp. 1100 and 1201 of exh. C6);

(c) Tan Sri Lee is one of the four directors of the appellant in 1994, and one of the nine directors of the appellant in 1998 (pp. 1106 and 1179 of exh. C6);

(d) The chairman of the appellant in 1994 and 1998 is Gen (R) Tan Sri Dato' Paduka Mohamed Hashim bin Mohd Ali (pp. 1073 and 1183 of exh. C6);

(e) There are shares held in nominee accounts for CHVSB. These shares are already counted in the total direct and indirect interest of Tan Sri Lee in the appellant. The names of these nominee accounts are banking nominee accounts. The nominee company is the shareholder, which is typical where shares are charged. Neither Tan Sri Lee nor CHVSB is the registered shareholder (p. 1101 of exh. C6);

(f) The significant amount of Tan Sri Lee's interest in the appellant's shares relate to charged shares. In 1998, such shares are 38%, of the appellant's total shares (p. 1101 of exh. C6);

(g) The respondent's witness, RW1 admitted in evidence that at the time Forms K and Forms KA were issued, including the penalties for YAs 1993 and 1998 were raised, the respondent did not know the shareholding of Tan Sri Lee in the appellant;

(h) The respondent's witness, RW1 confirmed that he had assumed that both the appellant and the disposers were related because these entities purportedly had the same registered address, Tan Sri Lee being a common director and similar letterheads. RW1 too testified that he did not carry out any check on the appellant and the disposers' actual shareholding. Neither was the appellant and disposers are part of the same group of companies;

(i) It was also in evidence that two or more companies can have the same registered address without having any connection to each other and that some big secretarial firms can be registered address for thousands of companies. A registered address is a requirement of law and does not have to be where the businesses are conducted; and

(j) At no point did the respondent ever communicate to the appellant as to why the notices were issued to the appellant.

Points Raised By The Respective Parties

For the Appellant

[12] Learned counsel for the appellant, amongst others, raised the following arguments:

(a) All the 13 notices of assessment (Forms K) and the notices of additional assessment (Forms KA), including the penalties for YAs 1993, 1998 and 1999 issued in the year 2006 are time-barred under s. 15(1) of the

RPGTA. The exception to s. 15(2) of the same Act is only applicable to the person chargeable with tax, that is the disposer of the property. The said provision is not applicable to the acquirer;

(b) The respondent has failed to discharge the burden to show that the said notices of assessment and notices of additional assessment were raised to make good loss of tax arising from the fraud or wilful default of the person chargeable with tax;

(c) Section 15(2) of the RPGTA by its express wording can only be applied on a person who is chargeable to tax, to make good loss tax attributable to the fraud and wilful default by that person. The appellant in this case is not a "chargeable person". Under s. 6(1) of the RPGTA, the "chargeable person" is the disposer;

(d) Both the acquirer and the disposer had subsequently lodged the respective Forms K and Forms KA, including the penalty for YAs 1993, 1994. The disposers in this case had admitted liability, executed the letters of agreement and issued post-dated cheques according to approved instalment scheme. The disposer did not refuse to pay real property gains tax. The respondent claimed that the post-dated cheques had bounced and this formed the integral part of the decision to raise the above notices *vide* Forms K and Forms KA, including penalty on the appellant;

(e) The charge to real property gains tax under the RPGTA is on gain accruing on disposal of chargeable assets. Section 16(1)(b) of the RPGTA allows the acquirer to be assessed to tax where there is failure by both the disposer and the acquirer to submit a return to the Director General in the prescribed form as required by s. 13 of the RPGTA. The SCIT made a fundamental error when holding that the respondent has the power to issue assessments pursuant to s. 16(1)(b) of the RPGTA whilst having made a finding that the returns have actually been filed;

(f) The SCIT's conclusion had been wrongly influenced by an allegation that the appellant and the disposers are connected. This fact is in fact irrelevant for purposes of s. 16(1)(b) of the RPGTA. This conclusion is erroneous and irrelevant for purpose of s. 16(1)(b) of the RPGTA;

(g) The findings that the appellant and the disposers are connected is an unreasonable conclusion as the disposers are companies privately held. Whilst the appellant is a public listed company which shares are listed on the Main Market of Bursa Malaysia Securities Berhad (Bursa Securities). The facts which learned counsel had highlighted in his written submission had shown that the SCIT had ignored the uncontested facts completely when arriving at its conclusion. The

findings of fact of this case cannot properly support the conclusion that the appellant and the disposers are connected. The SCIT had relied on facts which have no probative value;

(h) With regard to issue 4 which was premised on the fact that part of the "retention sum" under the sale and purchase agreement dated 25 September 1998 entered into between the appellant and HRMSB, the said sum is still with the appellant. It was the respondent's own fault for not issuing notice for remittance of the retention sum. Only if the respondent had assessed the disposer, then a requisition for the retention sum can be lawfully issued. The respondent cannot in law now issue the requisition as it has assessed the wrong party. Under s. 21B of the RPGTA the appellant is required to continue to retain the said sum as it has no legal right to remit the retention sum to any person without the proper requisition;

(i) By issuing the notices as set out herein and requiring the appellant to pay taxes of the disposers would cause the appellant to breach the provision of CA, SIA and CMSA respectively which prohibit the appellant, a listed company to bear taxes of privately owned entities which were of the disposers of the properties;

(j) In view of the aforesaid, the 10% penalty ought to be discharged in full. The penalty to be imposed under s. 29(3) of the RPGTA is discretionary but the facts clearly showed that the said penalty had been imposed mechanically; and

(k) Based on these issues, the appellant submits that the appellate intervention is warranted.

For The Respondent

[13] Learned counsel for the respondent raised the following arguments:

(a) The notices of assessment as well as the notices of additional assessment are not barred by s. 15(2) of the RPGTA despite the same having been issued after the six years stipulated by that section had lapsed as the appellant had committed fraud and/or wilful default and/or negligence;

(b) The respondent is empowered to issue the notices of assessment and notices of additional assessment to the appellant as the acquirer under s. 16(1)(b) of the RPGTA where both the disposer and the acquirer had failed to submit Form CKHT-1 and CKHT-2 respectively within 30 days from the date of disposal or acquisition;

(c) The failure on the part of the disposers, which companies are privately owned companies of Tan Sri Lee and the appellant as the acquirer, tantamount to a wilful default as the disposers and the appellant were controlled by the same Tan Sri Lee through shares owned by Tan Sri Lee in his privately-owned companies and also in the appellant;

(d) The appellant as the acquirer is responsible to pay the tax and this is in accordance with the law, hence validly issued;

(e) Without the disposer and/or acquirer having lodged the relevant CKHT1 and CKHT2, there was no way that the respondent would have knowledge about the transactions. Hence there was wilful default on the part of the appellant as the acquirer as well as the disposers for not submitting the relevant information to the respondent. Such Forms were submitted some 11 and 6 years respectively from the date of the disposal and/or acquisition; and

(f) With regards to the imposition of 10% penalty, the respondent submits that the penalty was legally imposed under s. 29(3) of the RPGTA which empowered the Director General of the Inland Revenue to impose penalty to any taxpayer who failed to submit any returns provided by RPGTA.

Duty Of The Court In A Case Stated

[14] Both learned counsel had submitted at length on the duty of the court in dealing with an appeal by way of a case stated. Under the ITA, parties who appeared before the SCIT may appeal to the High Court against the deciding order of the SCIT on a question of law (see paras. 34, 39, 41 and 42 of Schedule 5 to the ITA and *Director General of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91 at 97). According to the cases submitted by both learned counsel, generally, the appellate courts are particularly slow in interfering with the findings of tribunals specialising in specific fields.

[15] In tax cases, the courts in Malaysia have repeatedly referred to the case of *Edwards v. Bairstow* [1955] 3 All ER 48 where the court held that it is the duty of the court hearing a case stated to examine the determination of the SCIT having regard to its knowledge of the relevant law, however this duty is very limited. The High Court cannot reverse the Commissioners on their findings of fact except in the following circumstances:

(a) if the case contains anything *ex facie* which is bad in law;

(b) which bears upon the determination, it is, obviously, erroneous in point of law;

(c) if the facts found are such that no person acting judicially and properly instructed as to the relevant law could come to the determination under appeal;

(d) if there has been error in point of law;

(e) if the case is one where there is no evidence to support the determination;

(f) if the case is one where the evidence is inconsistent with and contradictory of the determination; or

(g) the true and only reasonable conclusion contradicts the determination.

[16] The court had noted the caution made by Court of Appeal in the case of *Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923 where the Court of Appeal *vide* the judgment of His Lordship Abdul Wahab Patail (JCA as His Lordship then was) had stated as follows:

> [24] We make the general observation that courts, *acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT*.
>
> [25] *Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT*. (see *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri*, [1994] 3 CLJ 541; [1994] 2 MLJ 713 SC).
>
> (emphasis added)

[17] I have considered the cases cited by learned counsel for the appellant with interest which delved with the manner the taxing Act should be construed. (*Palm Oil Research & Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd* [2004] 2 CLJ 265; *WT Ramsay v. Inland Revenue Commissioners* [1982] AC 300 at 323; *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810 and *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99). All these cases seem to suggest that in dealing with the taxing law, one needs only look at the ordinary meaning of the words in the law and not to focus on intendment as there is no equity about tax. In the event there is ambiguity, the ambiguity must be decided in favour of the taxpayer. The provision of the tax law too must be strictly construed. The court too is reluctant to impose liability on the taxpayer when doubt exists. From the authorities cited by learned counsel of the appellant, it is clear that the RPGTA must be construed strictly.

[18] Mindful of my functions in a case stated as discussed above and guided by the authorities submitted by both parties, upon perusal of all the relevant documents filed herein, having considered the oral and documentary evidence adduced before the SCIT, the findings of facts made by the SCIT, the decision of the SCIT and upon reading the written submissions and hearing the oral submissions of the respective parties, my decisions on the case stated are as discussed below.

Discussions Of The Issues And Decision Of The Court

Issue 1: Whether The Respondent Is Time-Barred Under Section 15(1) Of The RPGTA?

Issue 2: Whether The Respondent Can Invoke Section 15(1) Of The RPGTA Against The Appellant?

Issue 3: (i) Whether The Respondent Has The Power To Issue The Notice On The Appellant Who Is The Acquirer Of The Chargeable Asset Under Section 16(1) of RPGTA; and

(ii) Whether The Notice Were Validly Issued.

[19] It is not disputed that all the notices of assessments and the notices of additional assessments for YAs 1993, 1998 and 1999 raised in 2006 are time-barred under s. 15(1) of the RPGTA as these notices were issued beyond the six years from end of YAs 1993 and 1998 (see column 1 of appendix 1 at pp. 5 to 8 of the case stated). This fact was conceded by the respondent and acknowledged by the SCIT.

[20] As the notices of assessment and notices of additional assessment were not made within the prescribed period, the respondent could only rely on s. 15(2) of the RPGTA which extends the time bar in cases involving fraud and wilful default committed by the person chargeable with the tax.

[21] In cases involving fraud and wilful default, the burden is on the respondent to prove the person chargeable with tax is guilty of fraud or wilful default.

[22] In order to ascertain if the respondent had correctly and validly made an assessment on the proper person as stated in s. 15(2) of the RPGTA, one has to examine the facts that were disclosed before the SCIT.

[23] It is not disputed that the case at hand is concerned with firstly, the respondent's exercise of the discretion to assess the appellant who was the acquirer of the entire issued and paid-up capital of the real property companies set out in column 7 of items 1 to 8 of appendix 1 (pp. 5 to 8 of the case stated) from ECSB (the disposer), for cash consideration. This relates to tranche 1 of the acquisition.

[24] Secondly, it touched on the exercise of discretion by the respondent to make an assessment on the appellant who was neither the disposer nor the acquirer of the chargeable assets (see column 8 of items 9 to 13 of appendix 1 (pp. 5 to 8 of the case stated). This relates to tranche 2 acquisitions. The acquirers of the chargeable assets were the subsidiaries of the appellant on whose behalf, the appellant executed the sale and purchase agreements to purchase the assets. The disposers were FRMSB, HRMSB, NCMSB, ERMSB and AMSB respectively.

(see pp. 5 to 8 of the case stated for details, including the dates of assessments that is 28 April 2006)

[25] The key words in s. 15(2) is "a person chargeable with tax". "Chargeable person" has been defined in s. 6 of the RPGTA as follows:

> 6. Chargeable person.
>
> (1) Subject to this Act, *every person whether or not resident in Malaysia for a year of assessment shall be chargeable with tax with respect of a chargeable gain accruing to him in that year on the disposal of any chargeable asset*.
>
> (2) The supplementary provisions in Schedule 1 shall have effect with respect to persons chargeable with the tax. (emphasis added).

[26] A plain reading of the above section of the RPGTA shows that "a chargeable person" or "persons chargeable with tax in respect of chargeable gain accruing to him in that year on the disposal of any chargeable asset" could only mean the "disposer" of the chargeable asset.

[27] Section 15(1) of the RPGTA provides the time frame within which the respondent is allowed to make an assessment and/or additional assessment with respect to "a person chargeable with tax" if it appears to him that no or no sufficient assessment has been made on "a person chargeable with the tax", in respect of any year of assessment, which is within six years after end of that year of assessment.

[28] Section 15(2) of the RPGTA states that if the person chargeable with tax is guilty of any form of fraud or wilful default in relation to the tax, the respondent may at any time make an assessment in respect of that person for the purpose of making good any loss of the tax attributable to the fraud or wilful default.

[29] The provisions of s. 15 are as follows:

> 15. Additional Assessments.
>
> (1) The Director General, where in respect of any year of assessment it appears to him that no or no sufficient assessment has been made **on a person chargeable with the tax**, may within six years after the end of that year of assessment make on that person whatever assessment or additional assessment he considers to be appropriate.

A

(2) The Director General, **where it appears to him that a person chargeable with the tax has been guilty of any form of fraud or wilful default** in connection with or in relation to the tax, may at any time make an assessment in respect of that person for the purpose of making good any loss of the tax attributable to the fraud or wilful default.

B

(emphasis added)

[30] A plain reading of s. 15(2) of the RPGTA would show that the person responsible to make good loss of tax attributable to the fraud or wilful default by that person, could only mean the "disposer" of the property.

C

[31] It is not disputed that the notices of assessment (Forms K) and notices of additional assessment (Forms KA), including the penalty for YAs 1993 were not raised on the appellant to make good loss of tax arising from purportedly the wilful default of the appellant as the disposer. Instead, the appellant here had been issued with notices of assessment and notices of
D additional assessment in its capacity as the acquirer of the chargeable assets.

[32] As the real property gains tax is charged in respect of chargeable gain accruing on the disposal of any chargeable asset and the acquirer herein makes no gains out of which tax can be paid from, the question which arose from this is whether all the notices of assessment and the notices of additional
E assessment were lawfully and validly made against the acquirer.

[33] Unlike the exception to time bar in s. 91(3) of the ITA, which empowers the DG to make an assessment in respect of "any person" for the purpose of making good any loss of tax attributable to any form of fraud or
F wilful default committed by or on behalf of that person or the negligence of that person, under s. 15(2) of the RPGTA, an assessment can only be raised against the "person chargeable with tax", that is, the "disposer" for the chargeable asset for loss due to fraud and/or wilful default of the person.

[34] In essence, the charge to real property gains tax under RPGTA is on
G gain accruing on disposal of a chargeable asset. Real property gains tax is not imposed on the acquirer since the acquirer does not make a gain from the acquisition.

[35] Section 16(1) of the RPGTA provides a departure from the general rule. This section allows the Director General to make an assessment on the
H acquirer of an amount equal to the amount of tax payable by the disposer when "there is failure by both the disposer and the acquirer to submit a return to the Director General in the prescribed form as required under s. 13". Pursuant to s. 16(1A) of the RPGTA, the Director General shall include in the assessment made under s. 16(1)(b) of the RPGTA, an amount
I equal to 10% of the tax payable by the disposer. Section 16(3) allows the acquirer of a chargeable asset to recover the sum assessed under s. 16(1A) of the RPGTA from the disposer as debt due to him from the disposer.

[36] Section 16 of the RPGTA does not stipulate the time within which the Director General may make an assessment against the acquirer. Neither does this section provide for an extension of time for the Director General to make an assessment of the acquirer. Can the respondent then rely on s. 15(2) of the RPGTA to make the acquirer liable to make good the loss of tax. It is my view without any express provision in s. 15(2) to connect the acquirer to that particular section, the respondent could not rely on s. 15(2) to open up the time bar provision for him to make an assessment on the acquirer to make good the loss of tax purportedly attributable to fraud or wilful default. Upon my reconciliation of these two sections, I found that there is nothing to suggest that the respondent can rely on s. 15(2) of the RPGTA for the purpose of s. 16(1)(b) of the RPGTA.

[37] Based on my reading and understanding of the above-stated provisions of the RPGTA, as discussed above, I agree with the submission of learned counsel for the appellant that s. 15(2) of the RPGTA identifies the person to be charged with tax in respect of chargeable gain accruing to him in the year the chargeable asset was disposed of as the "disposer" of the asset.

[38] Therefore, with respect to the notices of assessment and notices of additional assessment for YAs 1993 specified in items 1 to 8 of appendix 1 (see pp. 5 to 8 of the case stated), obviously, the exception to the six year time bar specified in s. 15(2) of the RPGTA cannot apply to the appellant as the acquirer of the chargeable asset. The exception to the time bar in s. 15(2) of the RPGTA only applies to a chargeable person, ie, the disposer. I agree with the contention of learned counsel for the appellant, based on its ordinary, plain and natural meaning the words in s. 15(2) must only mean and/or interpreted to mean, in cases where the assessment is made beyond the six year period, the person chargeable with tax who is responsible for making good any loss of tax attributable to fraud or wilful default, is the disposer of the chargeable asset.

[39] In view of the aforesaid, it is my humble opinion that the SCIT has erred in law in its interpretation of the specific provisions of the RPGTA by making the appellant who is not a "disposer" to make good the loss of tax, purportedly due to the acquirer's fraud or wilful default. This interpretation of s. 6 and s. 15 is crystal clear without the court having to resort to the rules of interpretation as set out in text-books on legislative drafting and on case laws for guidance.

[40] Turning now to the notices of assessment and notices of additional assessment for YAs 1998 specified in items 9 to 13 of appendix 1 (at p. 5 to 8 of the case stated), where the appellant was identified as the person who has committed fraud and wilful default to make good the loss suffered by the respondent. With respect to YAs 1998 as identified above, the appellant is

not even the acquirer and/or the disposer of the chargeable assets to begin with. It was confirmed by the AW2 during examination-in-chief that pursuant to the sales and purchase agreements dated 25 September 1998, the appellant on behalf of its subsidiaries agreed to acquire the real property from the companies listed in column 9 of items 9 to 13 of appendix 1 to exhibit SA (at pp. 6 - 8 of the case stated), for its subsidiaries (the acquirers) Timeless Yeild Sdn Bhd, Paramount Returns Sdn Bhd (Golden Horses Development Sdn Bhd at p. 1237 of exh. C6), Endless Gain Sdn Bhd, Profound Concept Sdn Bhd and Premier Gateway Sdn Bhd (now known as Mines Waterfront Business Park Sdn Bhd).

[41] It was also confirmed by AW2 that the said acquirers are wholly-owned subsidiaries of the appellant (also see p. 1095 of exh. C6). There is a clear finding of fact with respect to the proper parties the chargeable assets were disposed to, ie, the subsidiaries of the appellant and not the appellant (see para. 7(xiii)) of the case stated (at p. 12). This is supported by cl. 7.1 of each of the sale and purchase agreement entered into for the acquisition of the real property mentioned in column 7 appendix 1 of exhibit SA (at pp. 6 - 8 of the case stated) (see pp. 142 and 193 of exh. C1, pp. 228 - 299, 261 - 262, 306 - 307 of exh. C2).

[42] The SCIT appears to justify its decision by stating that there is evidence to show that the transfer of real properties occurred between Tan Sri Lee's five private companies to the appellant in 1998 based on the sale and purchase agreements dated 25 September 1998 (see para. 10.7 of the case stated) when there is contrary finding of fact relating to this. After having made a finding that the real properties were disposed to the appellant's subsidiaries, the SCIT went on to find facts to the contrary. This can be seen at para. 10.7 of the case stated where the SCIT has stated that the transfer of real properties occurred between Tan Sri Lee's five private companies to the appellant.

[43] This finding of fact by the SCIT is clearly contrary to its own finding of fact as illustrated above. The SCIT clearly erred because after finding that the acquirers of the real properties were the subsidiaries of the appellant, it again made a finding that the transfer of the real properties occurred between Tan Sri Lee's private companies to the appellant. Hence, the SCIT has erred when it reached a conclusion that contravened the finding of facts and the deciding order. Section 16(1) of the RPGTA would not be applicable to the appellant as the appellant was neither the disposers of the asset nor the acquirers of the real properties with respect to YA 1998. Insofar as 1993 is concern as s. 15(2) of the RPGTA has specifically made reference to the disposer of the property to make good the loss if found attributable to fraud or wilful default.

[44] The respondent cannot invoke the provision of s. 16(1)(b) of the RPGTA as the appellant is neither the disposer nor the acquirer of the real properties. Further s. 16(1)(b) of the RPGTA cannot be applied to assess the appellant once both the appellant and the disposers have filed their returns in the prescribed form. It is proven before the SCIT that both the appellant and the disposers have filed their returns. In view of this, the provision of s. 16(1)(b) of the RPGTA cannot be invoked against the appellant.

[45] I had explained above, s. 15(2) of the RPGTA gives the power to the respondent to make an assessment beyond the period of six years to make good the loss attributable to fraud and wilful default, if it appears to him the disposer has been guilty of fraud and wilful default. As the appellant is not the disposer, the respondent cannot rely on s. 15(2) for the appellant to make good the loss suffered by the respondent, purportedly due to the fraud or wilful default of the appellant.

[46] Therefore, the notices of assessment and notices of additional assessment issued to the appellant with respect YA 1998 who are neither the disposer nor the acquirer were illegally and unlawfully issued. The fact that the appellant had filed the returns as the acquirer of the real properties is of no significance as it has done so on the direction of the respondent.

[47] In view of the aforesaid, I agree with the contention of the appellant that for the purpose of YAs of 1993, 1998 and 1999, the respondent cannot invoke the provision of s. 15(2) of the RPGTA to enlarge the time for assessment to make good the loss of tax purportedly due to fraud or wilful default. There is no necessity for me to even discuss whether the appellant was guilty of fraud or wilful default as s. 15(2) does not affect the appellant as the appellant is not the disposer of the chargeable asset.

[48] In view of the above, the respondent has wrongly directed the appellant to submit the returns with respect to YA 1993.

Was The Appellant Guilty Of Fraud Or Wilful Default

[49] Notwithstanding my views as stated above, I will now examine if the respondent had discharged the burden of proving that the appellant was guilty of any form of fraud or wilful default in connection with or in relation to the tax, so as to justify the act of the respondent in making assessment on the appellant for the purpose of making good any loss of tax due to fraud or wilful default.

[50] In order to rely on s. 15(2) of the RPGTA, the respondent must prove the following:

(a) There must be fraud or wilful default by a person chargeable with the tax;

(b) An assessment may be made in respect of that person; and

(c) The assessment must be for the purpose of making good any loss of tax attributable to the fraud and wilful default of that person.

[51] I have considered the authorities submitted by both parties with regards to the burden of proof in cases of fraud or wilful default or negligence as envisaged by s. 91(1) and (3) of the ITA which are somewhat similar to s. 15(2) of RPGTA (except for the additional act of negligence in s. 91(3) of ITA and persons targeted by both these sections). Cases such as *Government of Malaysia v. Gan Chuan Lian* [1992] 1 CLJ 678; [1992] 2 CLJ (Rep) 424; [1992] 1 MLJ 449 at p. 443 and *Government of Malaysia v. Ng Song Choon* [1974] 1 LNS 41; [1975] 1 MLJ 131 decided that in cases involving fraud or wilful default or negligence, the Director General of Inland Revenue must adequately support his allegation of fraud or wilful default or negligence. If he has not discharged this burden of proof then he is not entitled to make additional assessment beyond the prescribed period stated in s. 91(3) of the ITA.

[52] The court in *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co* [1992] 4 CLJ 2079; [1992] 1 CLJ (Rep) 135; [1992] 2 MLJ 708 held that s. 91 of the ITA is penal in nature and therefore must be construed strictly. Except for the two significant differences in s. 91(3) of the ITA, the rest of the wordings in these two sections are somewhat similar. The first difference relates to the type of actions which justify extension of time and the second difference relates to the persons targeted by these sections. In the case of s. 91(3) of the ITA there are three acts which justify opening of the time bar provision, ie, fraud, wilful default and negligence. Whilst s. 15(2) of the RPGTA specifies only two acts, ie, fraud and wilful default. The second difference relates to the person targeted by these two sections. Section 91 of the ITA is rather general in nature and aims not only the taxpayer but also any third party. Whilst s. 15(2) is directed only to a person chargeable with tax, the disposer of the chargeable property.

[53] As the purport and substance of the ITA and the RPGTA are somewhat similar, except for the two distinctions as set out above, I agree with the submission of learned counsel for the appellant, like the ITA, the RPGTA too must be construed strictly.

[54] I have also considered the authorities submitted before me pertaining to what amounts to "wilful default" such as *Paramount (M) Sdn Bhd v. Pesuruhjaya Khas Cukai Pendapatan* [2002] MSTC 3,908 which made reference to the case of *Frederick Lack v. Dogget* 46 TC 524 which again made reference to the case of *Wellington v. Renolds* [1962] 40 TC 209 (all cases on tax) which quoted the Court of Appeal judgment in *Re City Equitable, Fire Insurance Co Ltd* [1925] Ch 407 at p. 434 in the Court of Appeal where, Edmund Davies LJ said as follows:

> Fraud and wilful default, to my way of thinking, do not connote mutually exclusive circumstances. A situation may justify allegations of both kinds of behavior. This is not to say that every case of wilful default also connotes fraud, any more than fraud in every case also connotes wilful default. So to hold would be absurd. I decline to hold that there can be no wilful default provided that returns of some kind are made. On the contrary, I hold that, notwithstanding *that they have been made, wilful default can be established by showing wilful errors. More than that, however, would have to be proved before a taxpayer could be shown to have committed fraud*. (emphasis added)

[55] A perusal of the case stated (see pp. 24 to 26) disclosed that the SCIT's main focus for concluding that the appellant must make good the loss of tax to the respondent was not premised on fraud but on wilful default. The SCIT had provided its reasons to support its conclusion that there was wilful default on the part of the appellant, which I have considered. As I had stated earlier, ss. 6 and 15 of the RPGTA are not applicable to the appellant as the appellant is not the disposer of the chargeable asset. Instead, the companies listed in column 9 of appendix 1 are the disposers (at pp. 5 to 8 of the case stated).

[56] Hence, there must be facts before the SCIT that there was fraud or wilful default on the part of these companies. As the SCIT was not relying on fraud to substantiate its conclusion in favour of the respondent, I will not elaborate on fraud as a ground for opening of the limitation period provided under s. 15(2) of the RPGTA. Neither will I discuss the cases relating to fraud. I acknowledge that the cases submitted by both learned counsel for the appellant and the respondent are relevant and be of guidance in the event fraud is established. As fraud is out of the picture, I will merely focus on the issue of wilful default.

[57] Based on my reading and understanding of ss. 6 and 15 of the RPGTA, and for the reasons I have stated thus far, s. 15(2) of the RPGTA can only be applied to person who is chargeable to tax, to make good loss of tax attributable to the fraud or wilful default of that person.

[58] The respondent contended that under s. 16(1)(b) of the RPGTA, the acquirer can be assessed in terms of real property gains tax if there is failure on the part of both the disposer and the acquirer to submit the returns in the prescribed form to the respondent. It was also further submitted that the respondent may make an assessment on the acquirer of an amount of tax payable by the disposer. In a nutshell, under s. 16(1)(b) of the RPGTA, the respondent can make the acquirer of the chargeable asset to be liable to make good the loss of tax if both the disposer and the acquirer do not file the returns in the prescribed manner.

[59] With the filing of the relevant Forms CKHT1 and CKHT2 by the disposers and the acquirer pursuant to the directions of the respondent, the admission of liability by the disposer, the execution of letters of agreement and the issuance of post-dated cheques amounting to RM22,208,662.30 according to the approved instalment scheme (see pp. 177 to 197 of B1 and the documents in B2), could the SCIT safely make a finding that the appellant was guilty of wilful default in connection with the real property gains tax and hence liable to make good the loss of the tax attributable to the wilful default.

[60] Further, despite alleging that the RM22,208,662.30 cheques had bounced, there was not an iota of evidence before the SCIT that attempts and/or demands were made to the disposer for the cheques to be replaced with new ones.

[61] Neither was there evidence before the SCIT that the respondent had liaised with the banks to confirm the status of the cheques issued by the disposers. There was also no evidence before the SCIT to show that the disposers had refused to pay. Despite a substantial amount of money in terms of chargeable tax was involved, a sum over RM22 million, there was no evidence led by the respondent to show the respondent's seriousness in pursuing the disposer with respect to the tax. In fact, the evidence adduced before the SCIT showed that there were explanation given by the disposers as to the reason for the delay in filing the returns within the prescribed time. I have perused the submission of learned counsel for the appellant pertaining to the reasons for the delay in the filing of the returns for tranche 1 and tranche 2 of the acquisitions by the appellant especially at paras. 4.4.7 to 4.4.39 (at pp. 21 to 29 of the appellant's written submission marked as "A") and found that there were explanations given by the appellant for not filing the returns sooner. In any event, as I am satisfied that s. 15(2) of the RPGTA cannot apply to the appellant in this case, I will not elaborate on the grounds of the delay proffered by the appellant.

[62] Having perused the submission of learned counsel for the appellant, I agree with the submission of counsel for the appellant, s. 16(1)(b) of the RPGTA could only be invoked if both the acquirer and the disposers do not file the returns in the prescribed form. In the case before the SCIT, for YAs 1993 both the acquirer and the disposer had filed the returns in the prescribed form even before the date of the assessments, ie, on 28 April 2006, that is, on 8 August 2004. The date of filing of the prescribed forms was on 8 August 2004. In the case of the appellant, it was directed by the respondent to file the prescribed form as the acquirer of the chargeable asset, which direction, as I had discussed above is illegal and unlawful.

[63] According to RW1, the 13 notices of assessment and notices of additional assessment with respect to YAs 1993, 1998 and 1999 were issued firstly because the disposers have failed to make payment for settlement of the real property gains tax payable, including the 10% penalty. Secondly, the SCIT was of the view that the appellant and the disposers are purportedly connected.

[64] It was the contention of the respondent that both the disposers and the acquirer in this case were controlled by the same individual, Tan Sri Lee. The respondent further argued that although on paper it would appear that the appellant is a public listed company, it has been demonstrated that, in reality, the appellant is in fact controlled by Tan Sri Lee through his nominees who hold shares on behalf of Tan Sri Lee himself or his own private companies.

[65] I observed that the SCIT was persuaded by the argument of the respondent that the appellant and the disposers are somewhat connected. This argument is not relevant for the purpose of s. 16(1)(b) of the RPGTA. From my reading of the findings of the SCIT, I observe that the SCIT was also persuaded by the argument of the respondent that the appellant and the disposer are connected by the fact all these companies which disposed the chargeable assets are connected and controlled by Tan Sri Lee (see para. 10.7 at p. 25 of the case stated). This finding, however was contrary to SCIT's own findings as stated at para. 7(xiii) of the case stated (at p. 12) which stated that the investigation conducted by the respondent disclosed that in YA 1998, five companies of Tan Sri Lee (those listed in items 9 to 13 (at pp. 6 to 7 of the case stated) had disposed of real property to the subsidiaries of the appellant. At para. 10.7 of the case stated, the SCIT had stated, based on the agreement executed on 25 September 1998 the real property was transferred from five companies privately owned by Tan Sri Lee to the appellant. These findings and conclusion made by the SCIT are erroneous and unsupported by the facts and the law surrounding this case. It is not disputed that the appellant is a public listed company, whilst the acquirers with respect to YAs 1998 are companies privately owned. In law, these two companies are distinct and separate from each other.

[66] In concluding that the appellant and the acquirers/disposers are connected, the SCIT fell into errors and had ignored the law and the facts before it:

(a) It is not a disputed fact that the appellant is a public listed company since 18 February 1994 (see p. 1195 of exh. C6), whose shares are listed on the Main Market of the Bursa Malaysia Securities Berhad (Bursa Securities);

(b) As a public listed company, the appellant has many shareholders and its shares are publicly traded;

(c) Besides Tan Sri Lee, there are other shareholders who hold substantial shareholding. Between 1994 to 1999, 47% and 60% of the appellant is held by other shareholders (see pp. 1100 and 1201 of exh. C6);

(d) Tan Sri Lee is only one of the four directors of the appellant (see pp. 1106 and 1179 of exh. C6);

(e) The Chairman of the appellant in 1993 to 1998 was not Tan Sri Lee but Tan Sri Dato' Paduka Mohamed Hashim bin Mohd Ali (see pp. 1073 and 1183 of exh. C6);

(f) The evidence showed that there are three independent members of the audit committee for 1994 and 1998 and Tan Sri Lee was not one of them (see pp. 1085 - 1087 and 1191 - 1193 of exh. C6);

(g) There are shares held in nominee accounts for CHVSB which had been accounted in the total direct and indirect interest of Tan Sri Lee in the appellant. These are banking nominee accounts and the nominee company is the shareholder, typical in cases where shares are charged. Neither Tan Sri nor CHVSB is the registered shareholder (see p. 101 of exh. C6);

(h) The respondent's assumption that Tan Sri Lee and the disposers are connected was based on the fact that the appellant and these companies share the same registered address, Tan Sri being a common director and similar letterheads being used;

(i) There was clear admission by the respondent's witness that he did not conduct a proper check to determine the status of the appellant *vis-a vis* the affected companies privately owned by Tan Sri Lee. Hence the finding that the appellant and the disposers are connected are not substantiated by evidence; and

(j) The respondent had not communicated to the appellant the reason as to why the appellant was assessed to tax. All allegations that the appellant and the disposers have common directors, same address and same letterheads were brought up or the first time before the SCIT on 16 and 17 October 2012.

[67] All the above was not considered by the SCIT when making the decision with respect to this appeal. The SCIT has ignored the above-mentioned facts completely when arriving at its conclusion and decision. The issue on the connection between the appellant and the disposers is dubious given the facts before the SCIT. The SCIT's findings of fact in this case cannot support its conclusion that the appellant and the disposers are connected. The findings of fact that Tan Sri Lee's indirect shareholding in

the appellant and similar letterheads and drawing inferences of secondary fact from them, in that, the appellant and the disposers are connected, show that the SCIT has misdirected itself and drew conclusion from facts having no probative value. The conclusion arrived at by the SCIT is not supported by evidence before it and/or the SCIT had made a conclusion that is inconsistent with the evidence of the case. In *Mamor Sdn Bhd v. Director General of Inland Revenue* [1979] 1 LNS 145; [1981] 1 MLJ 117, the court held that when the SCIT has reached a conclusion on facts which is not supported by evidence before it, the court has the power to review such decision.

[68] The facts showed that the appellant and the disposers are not part of the same group of companies. The appellant is a public listed entity with many shareholders. The respondent's action in assessing the wrong party prejudices the public shareholders of the appellant.

[69] There are obvious mistakes in the finding of facts made by the SCIT identified by learned counsel for the appellant and reproduce below as follows:

(a) At para. 7(i) of the case stated, the SCIT refers to pp. 5, 12, 19, 26 and 33 of exh. D2 and states that Tan Sri Lee wholly owns all the six disposers privately. In fact, Tan Sri Lee does not wholly own all these six companies privately. Golden Touch Venture Sdn Bhd (now known as Golden Touch Venture Sdn Bhd) (GTVSB) (p. 1236 of exh. C6) is the owner of the entire issued and paid-up capital of ECSB (p. 846 of exh. C5). ECSB wholly owns HRMSB, NCMSB, ERMSB and AMSB (See pp. 880, 900 and 920 & 940 of exh. C5). ECSB and Tan Sri Lee own 18.42% and 25.78% of the entire issued and paid-up capital of FRMSB. The balance of 50.49% and 5.31% of shares are held by Bee Garden Holdings Sdn Bhd and Puan Sri Tan Bee Hong (pp. 833-834 of exh. C5). The above-mentioned facts had not been disputed by the respondent. Pages 5, 12, 26 and 33 of exh. D2 only state the particulars of the directors, managers, secretaries and auditors of ECSB, HRMSB, NCMSM, ERMSB and AMSB but do not state the shareholding structure of the companies;

(b) The SCIT has stated that Tan Sri Lee is the director, managing director and largest shareholder in the appellant (reference made to pp. 1077, 1100, 1179, 1186, 1201 1207 and 1208 of exh. C6). The evidence showed that Tan Sri is not the largest individual shareholder in the appellant but CHVSB is the largest individual shareholder in the appellant (see pp. 1101 and 1201 of exh. C6);

(c) At para. 7(v) and (vii) of the case stated the SCIT made reference to p. 1208 of exh. C6 and states that Tan Sri holds a direct interest of 999,998 in the appellant but at p. 1208 of exh. C6 does not state so;

(d) At para. 7(xviii) of the case stated, the SCIT referred to pp. 1-8 of exh. D1 and states that the disposers had sent a letter dated 6 June 2005 suggesting proposed payment in instalment. This is not correct as the disposers presented the proposed instalment schemes *vide* their letter dated 30 May 2005 (pp. 228-239 of exh. B1); and

(e) At para. 10.13 of the case stated, the SCIT states that the disposers have filed Form CKHT 1 for tranche 1 acquisition on 8 September 2004 and 27 August 2004 and with respect to tranche 2 acquisition on 25 October 2004. In actual fact, the disposers have filed their returns with respect to tranche 1 acquisition on 9 November 2004 (pp. 123-168 of exh. B1) and in the case of tranche 2 acquisition on 27 August 2004, 9 September 2004 and 25 November 2004 (pp. 80 - to 122 of exh. B1).

[70] Despite not knowing if the appellant and the disposers are part of the same group (p. 554 of exh. C3), the respondent has treated the appellant and the disposers as part of the same group of companies.

[71] The significant amount of Tan Sri Lee's interest relates to charged shares. As the shares held in the banking nominee accounts, Tan Sri Lee has no control over them. Thus, it is clear that the issue of any common shareholding is an afterthought. RW1 himself admitted that he never checked the appellant's shareholding structure and does not know if these companies are in the same group. With this kind of admission by the witness, can the SCIT rule that the appellant and the disposers are on the same.

[72] With respect to shares held in nominee accounts for CHVSB, these shares are already counted in the total direct and direct interest of Tan Sri Lee in the appellant. These are banking nominee accounts and the nominee company is the shareholder, neither Tan Sri Lee nor CHVSB are the registered shareholders.

[73] Prior to issuing the notices of assessment and notices of additional assessment, including penalties, for YAs 1993, 1998 and 1999, the respondent never had any discussions with the appellant. The subject matter of its investigation has always been the vendors. No grounds were given to the appellant when the said notices of assessment and additional assessments were issued on the appellant purportedly under s. 16(1)(b) of the RPGTA.

[74] I observe that if at all the respondent is vested with a discretion under s. 16(1)(b) of the RPGTA, it has exercised that discretion without due care, for improper reasons and without a proper appreciation of the facts when the disposers had admitted liability, executed letters of agreement and issued post-dated cheques according to approved instalment schemes.

[75] There is no finding of fact on the refusal or failure of the disposers to pay. The finding of fact through RW1 stated that the respondent found the cheques provided by the disposers could not be cashed as there was no money in the account (see para. 7(xix) of the case stated). In the same breath, the SCIT stated that there is a letter from the disposer, ECSB dated 29 June 2005 for the respondent not to act upon the post-dated cheques issued for purposes of settling the payment due from the disposer to the respondent as the respondent was seeking the approval from the Minister of Finance for the payment of the tax to be waived (see p. 422 of exh. C3).

[76] With the filing of the relevant Forms CKHT1 and CKHT2 by the disposers and the acquirer pursuant to the directions of the respondent, the admission of liability by the disposer, the execution of letters of agreement and the issuance of post-dated cheques amounting to RM22,208,662.30 according to the approved instalment scheme (see pp. 177 to 197 of B1 and the documents in B2), could the SCIT safely make a finding that the appellant was guilty of wilful default in connection with the real property gains tax and hence liable to make good the loss of the tax attributable to wilful default?

[77] Further, despite alleging that the RM22,208,662.30 cheques had bounced, there was not an iota of evidence before the SCIT, that attempts and/or demands were made to the disposer for the cheques to be replaced with new ones.

[78] Neither was there evidence before the SCIT that the respondent had liaised with the banks to confirm the status of the cheques issued by the disposers. There was also no evidence before the SCIT to show that the disposers had refused to pay. Despite a substantial amount of money in terms of chargeable tax is involved, a sum over RM22 million, there was no evidence led by the respondent to show the respondent's seriousness in pursuing the disposer. In fact, the evidence adduced before the SCIT showed that there were explanations given by the disposers as to the reasons for the delay in filing the returns within the prescribed time.

[79] In fact, the correct person to be assessed, ie, the disposers have complied with the respondent's direction and had accepted liability. The amount of tax involved in this case is quite substantial, it would appear the respondent herein did not raise the notices of assessment and notices of additional assessment, including penalties, for YAs 1993, 1998 and 1999 to make good loss of tax but to have the responsibility for tax to be assumed as soon as possible by a public listed company which will be in a better position to settle the amount purportedly due to the respondent.

[80] The respondent contended that under s. 16(1)(b) of the RPGTA, the acquirer can be assessed in terms of real property gains tax if there is failure on the part of both the disposer and the acquirer to submit the returns in the prescribed form to the respondent. It was also further submitted that the

respondent may make an assessment on the acquirer of an amount of tax payable by the disposer. In a nutshell, under s. 16(1)(b) of the RPGTA, the respondent can make the acquirer of the chargeable asset to be liable to make good the loss of tax if both the disposer and the acquirer do not file the returns in the prescribed manner.

[81] I agree with the submission of counsel for the appellant, s. 16(1)(b) of the RPGTA can only be invoked if both the acquirer and the disposers do not file the returns in the prescribed form. In the case before the SCIT, for YAs 1993 both the acquirer and the disposer had filed the returns in the prescribed form even before the date of the assessments, ie, on 28 April 2006, that is, on 8 August 2004. The date of filing of the prescribed forms was on 8 August 2004. In the case of the appellant, it was directed by the respondent to file the prescribed form as the acquirer of the chargeable asset, which direction, as I had discussed above is illegal and ought not to have directed to begin with.

[82] In view of the aforesaid, the SCIT had committed a blatant error in law and has reached a conclusion on facts that is not supported by the evidence before them. This has led to the SCIT in arriving at a finding of facts that is not supported by the evidence.

Issue 5: Whether The Respondent Is Correct In Taking The Disposal Date Of Real Property As 21 May 1999?

[83] Turning now to the notice of assessment or YA 1999 (pp. 53-55 of exh. B1) (see item 13 of appendix 1 to exhibit SA at pp. 7 & 8 of the case stated), where the respondent had taken the disposal date as 21 May 1999 which fell under YA 1999 and not in the year the sale and purchase agreement was executed, 25 September 1998 which fell under YA 1998 (see pp. 279-338 of exh. C2). Section 6 of the RPGTA had specifically provided for real property gains tax to be charged in respect of a chargeable gain accruing in the year of the disposal of the chargeable asset. Even the respondent's own witness had admitted that he has made an error in taking the disposal date of real property as 21 May 1999 instead of 25 September 1998, the date the sale and purchase agreement was executed. No steps were taken by the respondent to correct the error.

[84] As the date stated on the returns was wrong and no effort having been made to correct it, the notice of assessment is therefore bad in law. This has resulted in an assessment being raised, amongst other things, in the wrong year. There is fundamental error having been committed. Hence, the appellant ought to be discharged.

[85] The respondent chose not to address this issue in the hearing before the SCIT on 16 and 17 October 2012. Neither was this issue addressed in its written submission. As this issue had not been addressed and/or pursued,

the respondent, is therefore deemed to have conceded that the notice of assessment for YA 1999 appellant had been wrongly issued. Hence, the appellant ought to be discharged from the said notice of assessment, including the penalty imposed.

[86] The SCIT's decision in dismissing issue 5 is based on the fact that part of the purchase consideration retained (retention sum) under the sales and purchase agreement dated 25 September 1998 entered into between the appellant and HRMSB is still held by the appellant till this date. This issue has no bearing on issue 5. The appellant cannot remit the retention sum due to the respondent's own failures. It is the respondent's fault for not issuing any notice for remittance of the retention sum on the disposers. Had the respondent assessed the disposers, he can lawfully issue the same. Unfortunately, in this case, the respondent had assessed the wrong party. The retention sum can only be paid to the respondent upon issuance of the requisition notice. Under s. 21B of the RPGTA, the appellant is required to continue retaining such sum and has no legal right to remit the same to any person without a proper requisition. The RPGTA provides the procedures to be adhered to before the retention sum could be released to the respondent. It is the respondent's own flaws in not assessing the proper person identified by the law and or issuing the proper requisition to the proper person. Any access paid by the appellant would be caught by the SIA, CMSP and CA.

Issue 4: Whether The Notices Of Assessment And Notices Of Additional Assessment Can Be Validly Issued On The Appellant When Compliance With And The Payment By The Appellant Would Give Rise To Offences Under Section 11(1) Of SIA, Section 354(1) Of CMSA And Section 133A (1) Of CA

[87] Learned counsel for the appellant contended that the notices of assessment and notices of additional assessment cannot be validly issued on the appellant as compliance with the same would expose the appellant to offences under various laws such as the CA, SIA and CMSA.

[88] Section 133A(1) of the CA prohibits making of loan to persons connected with directors of a company or its holding company. Any contravention with the provision of this section would expose the director who authorises the making of the loan guilty of an offence under this section and shall expose him to a penalty of RM10,000.

[89] Section 11(1) of the SIA and s. 354(1) of the CMSA make it an offence for breach the stock exchange rules. A listed company is also prohibited from providing financial assistance under the listing requirements. Any breach of the same may lead to suspension, de-listing or imposition of penalties or even prosecution of the directors.

[90] The appellant too ought not to pay taxes of private entities owned by its directors as this would jeopardise the interest of the minority shareholders. There is a risk of the interest of the shareholders to be compromised or conflict of interest when a company deals with directors or persons connected to them. This also may hinge on the aspect of corporate governance as it would involve improper payment of funds belonging to the public listed company and expose the directors to acts which will jeopardise the interest of the shareholders.

[91] If the appellant is directed to pay the tax due to the disposers, it would in fact pay real property gains tax of the disposers which are owned either directly or indirectly by Tan Sri Lee, a director of the appellant. Such payment can breach financial assistance laws as discussed above.

[92] In view of the above, s. 16(1)(b) must not be construed to allow such absurdity or injustice.

Issue 6: Whether Penalties Ought To Be imposed With Appellant

[93] In view of my findings as set out above, the notices of assessment and notices of additional assessment for YA 1993, 1998 and 1999 were raised without due or proper care and not for proper purpose. Therefore the 10% penalty imposed on the appellant ought to be discharged.

Conclusion

[94] Bearing in mind of the above stated principles, upon perusal of the cause papers, the written submissions of all the relevant parties herein and upon hearing learned counsel for the appellant and the respondent respectively and upon giving this matter a serious consideration, I am of the view that the decision of the SCIT suffered from infirmities as highlighted in the case of *Edwards v. Bairstow* [1955] 3 All ER 48 as well as other cases submitted to this court and such decision merit curial intervention. For the above-mentioned reasons, I allowed the appeal by the appellant with costs.

[95] I have also considered the respondent's cross-appeal on issue 5 and find there is no merit in the said appeal. The respondent's appeal is hereby dismissed with cost. After hearing a brief submission on the issue of costs, I have allowed costs of RM5,000 to be awarded to the appellant.

[96] For the purpose of these grounds of judgment, I have taken into consideration all the points that were submitted by both learned counsel. On the whole, I agreed with the points raised by learned counsel for the appellant and whatever lacking herein, I adopt those points as submitted by learned counsel for the appellant.

[97] I wish to make an observation here. I noticed that the respondent herein had not sought leave to appeal to the Court of Appeal but instead had proceeded to the High Court to seek for leave to file the appeal out of time which was granted by that court. This raises the issue of whether the appeal is properly before the Court of Appeal as there was non-compliance with the procedural requirement set out in the Court of Appeal Rules 1994.